

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF MASSACHUSETTS

3 No. 1:09-cr-10243-MLW

4

5 UNITED STATES OF AMERICA

6

7 vs.

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9 RYAN HARRIS

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13 For Hearing Before:
Chief Judge Mark L. Wolf

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15 Pretrial Conference

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17 United States District Court
District of Massachusetts (Boston.)
One Courthouse Way
18 Boston, Massachusetts 02210
Thursday, October 20, 2011

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1 P R O C E E D I N G S

2 (Begins, 11:30 a.m.)

3 THE CLERK: Today is October 20th, the case of
4 United States v. Harris, Criminal Action 09-10243, will
5 now appear before this court. Would counsel please
6 identify themselves for the record.

7 MR. BOOKBINDER: Good morning, your Honor,
8 Adam Bookbinder, and with me, from Criminal Justice, is
9 Mona Sedky, for the United States.

10 MR. McGINTY: And, your Honor, my name is
11 Charles McGinty from the Federal Defender Office and
12 with me is Christine Demaso from my office. My client
13 is on the line from Oregon, as I understand it.

14 THE COURT: Mr. Harris, are you able to hear
15 us?

16 THE DEFENDANT: (Via telephone.) Yes, I am,
17 your Honor.

18 THE COURT: Okay.

19 I think in the interest of full disclosure I
20 should ask a question and possibly explain something. I
21 should ask Ms. Sedky if her parents are Sharif and Julie
22 Sedky?

23 MS. SEDKY: Yes, they are, your Honor.

24 THE COURT: I practiced law with Ms. Sedky's
25 father from 1971 to 1974. I hadn't had any contact with

1 either of her parents for several decades, but I saw her
2 mother at a funeral in which I was speaking in
3 Washington a week ago Sunday. I'm confident that
4 Ms. Sedky's participation in the case would not affect
5 my ability to be impartial and I, at the moment, don't
6 think a reasonable person would question my impartiality
7 because of that.

8 However, I'm going to give each side a week, so
9 Mr. McGinty can talk to Mr. Harris, and let me know, um,
10 one, whether anybody's requesting my disqualification
11 under Section 455(b) for being actually biased or
12 prejudiced; two, whether you believe a reasonable person
13 would question my impartiality in the circumstances;
14 and, three, if the only possible basis for
15 disqualification is under 28 United States Code, Section
16 455(a), whether, as is permissible, you waive that as
17 the basis for my disqualification in this case.

18 MR. McGINTY: If I might, your Honor? There
19 has been, in our view, and I have spoken to Mr. Harris
20 about this, but there has been full disclosure about
21 this matter.

22 THE COURT: Oh?

23 MR. McGINTY: I raised it with Mr. Harris.
24 Mr. Harris, um, believes that it is not an issue. So,
25 um -- and we can submit something within a week, but I

1 would --

2 THE COURT: Oh, if you already knew about it.

3 MR. McGINTY: We knew about it, we discussed
4 it, we've had, as far as I'm concerned and my client is
5 concerned, sufficient information about it. We do not
6 view it as any grounds for disqualification of the Court
7 and we make an express waiver of that issue.

8 THE COURT: All right. And are there any
9 further questions you'd like to ask me, Mr. McGinty?

10 MR. McGINTY: None.

11 THE COURT: All right.

12 And what about the government?

13 MR. BOOKBINDER: Your Honor, again we raised
14 this issue with Mr. McGinty once we knew that you would
15 be hearing the case and we thought it appropriate to do
16 that. We had intended, if you hadn't beaten us to it,
17 to raise it today so that it would be on the record and
18 clear, but I don't think there's anything more --

19 THE COURT: All right. Well, I'm going to
20 proceed with the understanding that everybody, including
21 Mr. Harris, agrees that I'm not actually biased or
22 prejudiced, that a reasonable person wouldn't question
23 my impartiality under the circumstances, and that any
24 ground for objecting under Section 455(a) based on the
25 fact that I knew Ms. Sedky -- because I haven't had

1 her -- when she was very young, um, and the last time
2 being probably about 1974, um, so that's been waived.

3 All right. So why doesn't the government give me
4 an overview of this case. I know there's a motion to
5 dismiss and I'm not in a position to decide it today,
6 although I do want to get a fuller flavor for it. But
7 it would also help me to get a better feel for the case
8 generally.

9 MR. BOOKBINDER: Happy to do that, your
10 Honor.

11 Essentially, as you know, the indictment charges
12 conspiracy and, um, conspiracy to commit wire fraud and
13 substantive wire fraud and aiding and abetting wire
14 fraud, and the basis for those charges is a company that
15 Mr. Harris founded and ran called TCNISO -- but that
16 that company was a defendant in the case as well.
17 Initially the indictment was against both Mr. Harris and
18 his company, but it became clear fairly early on that
19 there really wasn't any company left, that the company
20 was defunct, at least practically speaking, it had
21 closed its office, it didn't have any employees, it
22 didn't have assets, it wasn't defending the case, and so
23 there didn't seem to be any purpose in proceeding
24 against the company.

25 So the government has moved in -- and I guess

1 maybe that motion is still pending, I'm not sure, but to
2 dismiss all the counts against the company. I guess
3 that would be a motion that this court would have to
4 rule on and I don't believe that that ever happened, so.

5 THE COURT: All right. We'll -- all right. I
6 don't seem to have that printed out, but we'll get it
7 and I will act on it.

8 (Pause.)

9 THE COURT: Apparently it's not on the docket.

10 MR. BOOKBINDER: Well, it's possible that it
11 was filed as a notice of dismissal and therefore didn't
12 trigger the motion procedure. We can take a look.

13 THE COURT: All right. Why don't you just get
14 me another copy.

15 MR. BOOKBINDER: We will do that, absolutely,
16 your Honor. There shouldn't be any issue, I don't
17 think, about that in this case. And so as the case
18 stands now, this is a case against only Mr. Harris.

19 And, um, what he did and what this company did was
20 they, um, developed and then sold and supported and
21 charged work with users of products that were designed
22 to allow people to modify their Internet cable modems so
23 that they could get Internet cable service without
24 paying for it, or if they were paying for service, they
25 could get faster high-speed service without paying the

1 premium for that. That's what the products did. But
2 what we've alleged, your Honor, is that Mr. Harris and
3 the company did more than just put these products out
4 there and allow people to buy them and use them, rather
5 they developed a product, first of all, that had no
6 other use, no legitimate use other than this, and that
7 they then created a website that allowed and that let
8 them work with their users to make sure that people
9 were, in fact, able to use these products to steal cable
10 service. So they put forums up there that allowed
11 people to share information about situations where
12 they'd been thwarted by cable companies, how to work
13 around that, how to actually trade information needed to
14 make all of this work, and we can get into this in more
15 depth and I'm assuming that we'll have an opportunity to
16 do that.

17 THE COURT: And just to clarify, is it certain
18 that that's a crime? I mean, a conspiracy has to be an
19 agreement to commit a crime.

20 MR. BOOKBINDER: Sure. Your Honor, the theory
21 in which it's a crime is that what the customers were
22 obtaining is something of value, meaning Internet
23 service that otherwise people would have to pay for, and
24 that they were doing it by misrepresenting to the cable
25 companies who they were. Essentially they're taking on

1 the electronic identities of the legitimate subscribers
2 and getting the service for which those other people
3 pay. So we, um, certainly charge that in doing that
4 that's a violation of our fraud statutes.

5 THE COURT: So it's charged as a wire fraud,
6 it's a scheme essentially to get money or property, and
7 to do that by making false representations essentially
8 representing, you would say, that the person was a
9 subscriber when they weren't a paid subscriber?

10 MR. BOOKBINDER: Correct. That's right. So
11 that's essentially the theory of the prosecution here.
12 Obviously Mr. McGinty has challenged it in his motion to
13 dismiss and we'll, I'm sure, be -- I assume the Court
14 will want to hear argument on that and we'll get into it
15 in more depth in the future.

16 THE COURT: I will. And assuming you survive
17 the motion to dismiss and the case isn't transferred to
18 California, um, how long do you think the case will take
19 to try, trying from 9:00 until 1:00?

20 MR. BOOKBINDER: Your Honor, we've discussed
21 this with Mr. McGinty and we expect that we would be
22 able to put in our case in somewhat less than two weeks,
23 but given that there may be a defense case and there's
24 obviously argument and instructions, the case could go
25 into a third week. So that's kind of where we stand.

1 THE COURT: Okay. I'll assume I have to carve
2 out three weeks at some point if the case is not
3 dismissed.

4 And have you calculated the sentencing guidelines
5 to determine what the government at least thinks the
6 sentence would be if the defendant went to trial and was
7 convicted?

8 MR. BOOKBINDER: The answer is we have, your
9 Honor, but I can't remember exactly where they are,
10 frankly, right now. But we've had some discussions with
11 Mr. McGinty about that and, um, they are, at least after
12 trial, you know, in the multiple years of jail level,
13 and that's part of the reason why this case is likely to
14 proceed to trial. We can certainly apprise the Court
15 more fully, but I just don't know exactly right now.

16 THE COURT: I'll ask you again when I see you
17 the next time.

18 Is there more I should know from the government at
19 this point?

20 MR. BOOKBINDER: I think that's the essence of
21 the charge and again, you know, we'll, um -- we'll get
22 into the issues Mr. McGinty's raised at that time.

23 MR. McGINTY: Um, your Honor, I don't know
24 that the government fully apprehends what theory it's
25 invoking here. It is presuming that the sale of cable

1 modems are the sale of a bad thing. Now it's not clear
2 how it's a bad thing because it's not illegal to design
3 it, it's not illegal to sell it, um, but they presume
4 it's a bad thing and therefore they presume that the
5 seller of that item is --

6 (Interruption by dial tone.)

7 THE COURT: We'll call Mr. Harris back.

8 (Places call again.)

9 THE COURT: Mr. Harris?

10 THE DEFENDANT: Yes.

11 THE COURT: Okay, we got cut off and now we're
12 reconnected.

13 THE DEFENDANT: Okay.

14 MR. McGINTY: So to resume, the government
15 presumes this is a bad thing, which is a proposition
16 that they've provided no case support or statutory
17 support for it, but they presume that the sale of that
18 item to a third party makes the seller an aider and
19 abetter of unknown conduct by that purchaser of the item
20 in whatever that purchaser's use of the product may be.
21 It also presumes that a conspiracy would link the seller
22 to the purchaser, to all others who similarly purchased
23 it, in effect a conspiracy of the fashion of a hub and
24 rim except there's no rim that links all of this
25 together.

1 Now to back up, Mr. Harris was part of a company
2 that had, um --

3 THE COURT: Well, let me just pause for a
4 moment because while I haven't been able to focus on
5 this much, I anticipate we're going to be having a
6 continuing conversation about this if the motion to
7 dismiss isn't allowed. And while in many respects, for
8 mail or wire fraud, a scheme to defraud is similar to a
9 conspiracy, it's possible to have a scheme to defraud, I
10 think, that might not satisfy the requirements for a
11 conspiracy. In other words, it goes to the issue of the
12 intent to defraud.

13 Owning a cable box, of course, is not
14 intrinsically illegal, um, but if somebody is -- and
15 this just comes to me, and I've spent a lot of time with
16 mail fraud in the **DiMasi** case recently, but if -- you
17 know, if somebody with intent to defraud is selling what
18 is, in isolation, a legitimate item and does so with a
19 demonstrated intent that the people he's selling it to
20 use it to defraud somebody, um, that, at the moment,
21 seems to me that it could be a scheme to defraud or, I
22 think, even though it's inherent in every criminal case,
23 they state that they're seeking aider and abettor
24 liability under Section 2 and then certain things would
25 have to be known -- and I don't know whether you can aid

1 and abet a crime by somebody you don't know exists. But
2 I'm just talking off the top of my head. But I think
3 these are some of the things we're going to have to
4 contend with.

5 MR. McGINTY: Right. Well, certainly we
6 dispute that the cable modem was designed for -- solely
7 for the purpose of that service. It had a diagnostic
8 capability. It had a way of ensuring and evaluating the
9 connectivity, um, which companies who purchased it did
10 it for purposes of diagnosing their cable modem
11 connection. There were legitimate purposes that this
12 was for. Among them, most generally, is that it would
13 ensure your connection to the Internet as would any
14 cable modem. So first there's a dispute about whether
15 this is solely for the purpose of doing something
16 involving the theft of services.

17 Even if the product is sold with knowledge that it
18 might be used for the purpose of a crime or harm to
19 others, in the civil law the analysis has been -- and
20 this goes back to Oliver Wendell Holmes. It has been
21 that the conduct of the third party is an intervening
22 event that breaks a line of causality back to the
23 seller. That rule has been followed in the civil law
24 ensuring that makers of potentially significantly
25 dangerous but legal items are not going to be held

1 civilly culpable for the use of the item even if they
2 know, or have reason to suspect, or have high cause to
3 assume, that it's going to be used improperly.

4 There's a conspicuous case some years ago, um, it
5 was a fellow who used black talon bullets to kill a
6 significant number of people. A suit was brought
7 against the manufacturer of the black talon bullet and
8 the suit rested on the proposition that he surely knew
9 that selling this to general customers, that persons who
10 were buying it would buy it with the intent to do harm
11 because the only thing that bullet did is tear flesh and
12 assure that whoever was hit with that bullet would be
13 killed and would be killed brutally and bloodily. And
14 despite that the Second Circuit asked the question
15 whether that's a foundation for civil liability and said
16 "No." That a manufacturer of a product that is not
17 defective has no responsibility to guard against the use
18 by third parties of this product even if you know how it
19 might be used.

20 So in Harris's case there are four persons who are
21 the trigger, so to speak, and these are the predicates
22 for the secondary liability. And so this case is this
23 mixed interaction between a venue contest and a motion
24 to dismiss because to take this case which is a -- what
25 is the consequence of a sale of a product from a

1 California place of doing business and bringing it to
2 Massachusetts where you say this rests on the conduct of
3 third-party users of the product, the government says,
4 "Well, we rest our charge on the primary conduct of the
5 persons who use the product and Harris is secondarily
6 liable because he provided the product that would be
7 used for that purpose."

8 THE COURT: I can think of another criminal
9 statute and a First Circuit case that we may have
10 differing views on, whether it's analogous, but for the
11 purpose of tax fraud, the First Circuit held, in
12 **Goldberg**, that if somebody provides rebates or money to
13 another person, it's not sufficient to prove that the
14 defendant who provided the money or the rebate knew that
15 the person who received the money, the cash, could use
16 it to avoid taxes. It's required that the government
17 prove beyond a reasonable doubt, to get a conviction for
18 tax conspiracy, that the defendant knew the person
19 would, um, use the money rebated, or the cash, um, to
20 defraud the IRS.

21 So it sounds like you're talking about something
22 similar and it may turn on the terms of the statute.

23 MR. McGINTY: And **Goldberg** is analogous.

24 THE COURT: I'm sorry?

25 MR. McGINTY: And **Goldberg** is analogous and

1 **Goldberg** said you have to know it's tax-specific
2 conduct, and here you have to know what they're going to
3 do with the device.

4 Now, um, presumably at some point complicity with
5 a person changes the analysis, but in this case there
6 are four persons who are the -- sort of the pivots with
7 the primary liability that's the predicate for the
8 secondary liability, and of these four three of them
9 are, as far as I understand, and the government has
10 effectively conceded, the entirety of their interaction
11 was through the purchase of firmware, either a modem or
12 software, from this company. The only other thing the
13 government --

14 THE COURT: Through the website?

15 MR. McGINTY: Through the website from
16 California. The only thing the government alludes to is
17 that these persons had access to the forum. And the
18 interesting thing about the forum is that, um, Congress,
19 seven or eight years ago, concerned about forums and
20 whether it was better to encourage forums --

21 THE COURT: What's a "forum" in this context?

22 MR. McGINTY: A "forum," in this case, would
23 be a website that goes to a forum where people could
24 send in their messages and sort of exchange information
25 and so forth. "Forums" are part of, as I understand it,

1 and I'm probably the last person to be responsive to
2 this --

3 THE COURT: That's why you need the younger
4 colleague.

5 (Laughter.)

6 MR. McGINTY: Who understands this thing. Um,
7 it provides sort of a chat capability where people can
8 go back and forth.

9 Congress in the -- in 47 U.S.C. 230, Subsection
10 (e)1, specifically provided that no provider of
11 interactive computer services -- and we're talking now
12 about a forum moderator, should be treated as the
13 publisher of information on a forum. In other words,
14 you can have a forum, you can host a forum --

15 THE COURT: But that's for libel law, I
16 presume.

17 MR. McGINTY: Well, no, that's for civil
18 liability --

19 THE COURT: Right.

20 MR. McGINTY: -- um, plenary civil liability,
21 um, part of it is libel, but part of it is legal, but
22 plenary civil liability. And what it does is it avoids
23 the problem where the forum moderator is viewed as the
24 responsible party for everything that ends up on the
25 forum.

1 Now, the government is saying that because people
2 access the forum and they exchange information, that
3 that somehow is part of the interaction with Harris for
4 purposes of Harris's criminal culpability about what
5 those persons may have done with the product.

6 THE COURT: Well, I doubt that the
7 government's arguing that that alone is sufficient.
8 They have to show that he did something with intent to
9 defraud and there are things that would be innocent if
10 you don't have intent to defraud that are criminal if
11 you do.

12 MR. McGINTY: But if there's a forum, if the
13 moderator is not responsible for what's on the forum, a
14 customer who gets a product, on their own time and using
15 their own Internet connection, hooks into the forum and
16 is viewing, um, chats on the forum, um, that doesn't
17 import knowledge to Harris about what that person
18 intends to do with the product.

19 So the entirety -- that three of the four pivot
20 persons, who are the persons who are supposed to be
21 primarily responsible here, the predicate for
22 culpability is the purchase of the product and that
23 these people may have accessed a forum, and that's it.
24 So the issue for those is, under what circumstances is
25 the seller of a product, lawful when sold, responsible

1 for the conduct of the third party who gets it?

2 And the cases that establish the parameters, and
3 this goes back to, um, **Falcon** and **Direct Sales**, two
4 Supreme Court cases in the '40s, and they provide the
5 divide in the analysis between what's potentially the
6 basis for criminal liability or potentially isn't.

7 **Direct Sales** related to multiple separate sales of large
8 quantities of morphine to a small-town doctor in the
9 Southwest -- in the Southeast of the United States.
10 Which doctor was advised by the DEA at the time -- well,
11 it wasn't the "DEA" at the time, but the narcotics
12 enforcement federal agency --

13 THE COURT: The -- well, anyway. Go ahead.

14 MR. McGINTY: -- that the feds were monitoring
15 his purchases, but they also notified the seller that
16 "If you continue to do this," which is selling large
17 block quantities of morphine, a controlled, restricted
18 -- a legally-restricted item, that "there may be
19 consequences," and the seller continued to sell it over
20 time. So the combination of the legal restriction on
21 the item, the morphine, um, repeated sales and warnings
22 and so forth, all of it combined for the Court to carve
23 out an exception to the general rule, articulated in
24 **Falcon**, that if an item is not legally restricted, um, a
25 seller of an item otherwise lawful to sell is not liable

1 even if that person knows of the use that that is going
2 to be put to. And in that case it involved the sale of
3 items that were used for manufacturing alcohol back in
4 the bad old revenue days.

5 So the boundaries here are was it legally
6 restricted? Was it not legally restricted? Under the
7 Supreme Court standards that tie together **Falcon** and
8 **Direct Sales** where an item is legal when sold, there is
9 no criminal culpability that arises even if one knows
10 the likely use of that product. That's consistent with
11 the civil cases that deal with the lesser standard
12 presumably for culpability in civil cases where the
13 issue is only monetary damages.

14 The government has not cited a single case, not
15 one, that supports the premise that underlies this,
16 which is that the seller of an item, in that act alone,
17 can be responsible for how that legally-sold product was
18 used. Not one case. And that's the --

19 THE COURT: Yeah, but there's -- we'll sort
20 this out. This is a valuable preview of coming
21 attractions. But let's say in the conspiracy context,
22 um, it's not illegal to sell a handgun, um, but let's
23 say somebody goes into a hardware store and says to the
24 owner who he knows, "I want to kill my wife by hitting
25 her on the head with a hammer, please give me a hammer

1 that will be suitable for that purpose," and the owner
2 says, "I agree that your wife's a pain in the neck, it
3 would be good to get rid of her, and we'll be able to
4 have a lot more fun together, so here's a hammer." So,
5 you know, in those circumstances it could be a
6 conspiracy revolving around the hammer and the sale of
7 the hammer and the provision of the hammer would be an
8 overt act in furtherance of the conspiracy even though,
9 in other contexts, it's an utterly innocent act to sell
10 somebody a hammer.

11 MR. McGINTY: Because it's complicity to know
12 that and that's what doesn't happen here.

13 THE COURT: Well, we'll get into this on the
14 hearing on the motion to dismiss.

15 You know, the general Rule 12 standard is that if
16 you have to try the case, you know, to find the facts,
17 um, that determine whether the case should be dismissed,
18 then you don't do that pre trial, that's **Barletta**,
19 **Jalbert**, um, well, I'll give you the cites in a minute.

20 MR. McGINTY: But the delicate issue, though,
21 is that in order for there to be an assurance to
22 Mr. Harris that he gets the benefit of his
23 constitutional right to proper venue, um, it is
24 necessary to look to see whether facts supporting the
25 complicity of which the Court discusses can be had in

1 this case. And the threshold barriers that exist
2 against that theory being more than, um, a mere fiction
3 here are that there is a Supreme Court-announced rule
4 that the sale of a legal item is okay even if you know
5 the likely use of the product. A seller of an item is
6 not in conspiracy by that fact with a purchaser.

7 THE COURT: By that fact alone.

8 MR. McGINTY: By that fact alone. And with
9 respect to three out of four of the named persons, that
10 is the fact.

11 THE COURT: How do I know that's the fact?

12 MR. McGINTY: Well, we know that because of
13 two things. One, no more than that is charged in the
14 overt acts of the indictment, and, I think, the
15 government has fairly disclosed --

16 THE COURT: But if it's charged as an overt
17 act, it has to be an act committed by a co-conspirator.
18 So the charge is that, you know, those three people
19 entered into an agreement with Mr. Harris to defraud the
20 ISPs.

21 MR. McGINTY: Well, the government has told
22 us, and I don't want to be making any statement here
23 that the government doesn't agree with, but my
24 understanding of what the government has represented to
25 us is that that's the sum total of the facts that would

1 be presented.

2 Now, there are cases under Rule 12 that talk
3 about, um, if no facts are going to get developed at
4 trial which change our review or in any way modify what
5 we have before us now, um, then it doesn't make any
6 sense to go through a trial to get to where we are
7 already. That would seem to be doubly so if the issue
8 is why is Harris, um, who is selling the product in
9 California, called in here for legal propositions that
10 are singular, unique, unsupported in the law, and under
11 **Falcon** flat out wrong?

12 THE COURT: All right, but let me, at this
13 point, just mention a couple of cases and you'll think
14 about whether you need to do more briefing. But one is
15 **Barletta**, 644 F.2d 50 at 58. Another one **Jalbert**, 242
16 F. Supp. 2nd 44, 45 to 46. And **Barletta** is a First
17 Circuit case explaining that: "The Court must defer
18 deciding a motion to dismiss if it requires a review of
19 a substantially complete portion of the evidence to be
20 introduced at trial and even if that's not the case,
21 where a decision requires more than a de minimis review
22 of evidence relevant to the general issue but less than
23 a substantially complete edification of such evidence.
24 The provision vests the timing of the decision in the
25 sound discretion of the district court."

1 I addressed this, to some extent, in one of my
2 many **Salemme** decisions, and you'll find it at 1997
3 Westlaw 810057, whether something's amenable to being
4 resolved on a Rule 12 motion.

5 MR. McGINTY: And I call this court, um, to a
6 case, **Andrade**, where the issue was the statute of
7 limitations. The accusation against **Andrade** is that by
8 virtue of participating in a drive-by shooting, a single
9 act -- a consequential act for sure, but a single act,
10 whether that act outside the statute of limitations
11 would carry an agreement or was the foundation for an
12 agreement which would carry into the limitations period,
13 and while the Court did not make the finding that
14 precipitated the dismissal, um, the government, in the
15 face of the analysis the Court had made, yielded to it.

16 The other example of that is Judge Keeton in
17 **O'Neil**, who basically said that if there's an issue
18 about the statute of limitations and we can resolve it
19 --

20 THE COURT: I'm sorry to cut you off. My
21 understanding is that the statute of limitations, um, is
22 in the heartland of those cases that should be decided
23 before trial, if they can.

24 MR. McGINTY: But the a fortiori aspect of
25 this is that the reason for doing it here is not the

1 convenience of resolving expeditiously a statute of
2 limitations issue, which is consequentially sure, but it
3 doesn't have the constitutional assurance of proper
4 venue right, which Harris is invoking here. If the
5 Court delays a resolution of this, um, it's fair to say,
6 predictably from what we have here, halfway through
7 trial in a forum that is neither convenient nor
8 appropriate, then we're going to be confronting the
9 issue of whether he is held for trial on facts which, as
10 the trial is developing, show that he shouldn't have
11 been brought here in the first place. And it's a little
12 late then to vindicate his right to a proper venue.

13 MR. BOOKBINDER: Your Honor, I will not
14 address all of what Mr. McGinty said and while I
15 certainly respect and appreciate his enthusiasm and
16 passion, I disagree with his factual assertions and the
17 legal assertions. But on the -- just two very quick
18 points.

19 The point that the Court raised about that hammer
20 analogy, I think it's appropriate and I think here what
21 we have is more than the example that you gave, your
22 Honor. You've got someone saying, um, "I've got a
23 business and I'm selling hammers. They're not good for
24 anything else, but they're good for killing people, and,
25 by the way, those people have come up with some ways to

1 defend against my hammers, so let's talk about ways we
2 can get around that so that you can accomplish what you
3 wanted to." So I suggest that it's very much what the
4 Court suggested maybe plus a couple of levels.

5 The second point you raised also, your Honor, is
6 that, as you know, venue is something that needs to be
7 properly alleged in the indictment, but ultimately it
8 comes down to what is proven at trial and we are not in
9 the business typically of pretrying cases to determine
10 whether the government will be able to prove what
11 they've alleged in the indictment, and that's what I
12 think Mr. McGinty is asking for.

13 THE COURT: Well, that's --

14 MR. McGINTY: Can I just make one response?

15 THE COURT: Yes.

16 MR. McGINTY: And the response is, that on
17 Mr. Bookbinder's hypothetical, 12(b)(6) on a civil case,
18 his complaint gets booted, it gets kicked out, and it
19 does on the strength of every single case except for
20 one, which is the hitman case that I've cited in our
21 papers, which is the only one that says that if you
22 write a manual about how to kill somebody, um, if that
23 manual is sufficiently specific and basically directs a
24 criminal act of the gravity of homicide, we will treat
25 you as legally culpable. That case stands alone for

1 civil liability.

2 So if I make a hammer and I say, "It's really good
3 for killing people," and I put that on the Internet and
4 I get sued, the only case that threatens me is that case
5 and all the rest of them say, "Not a problem." And I've
6 cited those cases in there. And I would feel, on a
7 12(b)(6), on the strength of the prevailing law, that he
8 loses. And that's not even a criminal case.

9 THE COURT: Well, we'll see.

10 Um, is this the first prosecution on this theory
11 in the country?

12 MR. BOOKBINDER: For this type of cable modem-
13 hacking tool, there was actually a prosecution out in
14 New York and Mr. McGinty cites it in his pleadings.
15 Ultimately it ended up with a plea to a different
16 charge, so there wasn't a testing of the theory. There
17 are, um, and I've cited some of them, but there are
18 aiding and abetting cases that involve people making
19 tools and selling tools to people committing crimes.
20 But on these exact facts, there is no prosecution on --

21 THE COURT: It's interesting. In the civil
22 context, there's an evolving body of law, and I haven't
23 dealt with it recently, but on what kind of activity on
24 the web creates sufficient contacts to permit
25 jurisdiction in civil cases. And I don't know whether

1 you've considered that body of law, at least by analogy,
2 because it all derives, you know, from a due process
3 analysis. So there are enough contacts with
4 Massachusetts, you know, to make it fundamentally fair
5 for somebody to be brought into court.

6 MR. BOOKBINDER: Your Honor, in this case that
7 would absolutely be a close analogy if you're talking
8 about sort of putting something on the web and seeing
9 who looks at it. Here you're talking about the
10 defendant shipping products to people buying them in
11 Massachusetts. So there's --

12 THE COURT: That's usually the case in the
13 civil context, too.

14 MR. BOOKBINDER: I suppose it depends, yes.
15 But, your Honor, so, you know, here you've got a known
16 sale to Massachusetts customers who then use the product
17 as they're designed to be used, and that's what we've
18 got. But we'll certainly take a look at that area.

19 THE COURT: All right. Well, the motion's
20 pending, so the speedy trial clock has stopped. It's
21 certainly engaged my attention.

22 You know, I mentioned to you -- I think I'm going
23 to give you a chance, based on this very -- from my
24 perspective, my preliminary off-the-top-of-my-head
25 discussion to supplement the memos that you've filed and

1 particularly to look at them in the context of **Barletta**
2 and **Jalbert** and what I said in **Salemme**, and I may have
3 only decided it orally, but I doubt -- well, it was
4 relatively recently in **Djokich**. It was a prosecution
5 and the argument was jurisdictional, the defense was
6 jurisdictional entrapment, or one of them was. That
7 somebody was lured from Canada to Massachusetts. And I
8 found that that was not permissible, or at least it
9 wasn't appropriate to do that pre trial, and so we tried
10 the case. If I -- if there's a record of my reasoning
11 in deciding that, I'll bring it to your attention.

12 But what if I give you, you know, say, two weeks
13 or maybe a little longer to supplement your
14 submissions. In view of my schedule, I would give you a
15 hearing in early December, something like --

16 MR. McGINTY: Since we replied to the
17 government's early submission, if the government could
18 have two weeks from that and we could have one week
19 after that to at least see what their response is, so
20 that we can -- so we could end up talking to each
21 other's papers, so to speak.

22 THE COURT: Well, I was thinking that I'd give
23 you each a period of time and then each a chance to
24 respond further today. But -- and you know what the --
25 I mean, I've just told you what's on my mind, how does

1 **Barletta** and the other case apply here?

2 I mean, another question I have -- is the
3 government going to provide any evidence of any -- you
4 know, that Mr. Harris knew of the existence of these
5 four people?

6 MR. BOOKBINDER: Your Honor, well, there's two
7 answers to that. First of all, one of the four he
8 communicated with directly, so there is that as to one.
9 As to the other three, we don't have evidence of direct
10 communications, but because they were customers to whom
11 he'd send modems in a business that he ran with maybe
12 one or two employees, we'd argue from that that he at
13 least knew he was shipping modems to these people in
14 Massachusetts.

15 THE COURT: All right. Because, of course,
16 the general instructions regarding conspiracy are that
17 the defendant doesn't have to know every other
18 co-conspirator. But I would think you would have to
19 know at least one of them to convict somebody on a
20 conspiracy theory --

21 MR. BOOKBINDER: Your Honor --

22 THE COURT: -- to know who you're agreeing
23 with.

24 MR. BOOKBINDER: There are other -- the
25 customers are charged for sure as co-conspirators, but

1 there are also other co-conspirators within his company
2 who will testify in this case and will testify about
3 what Mr. Harris knew about what they were doing and what
4 they were sent.

5 THE COURT: And that takes me back to where I
6 started, you know, sort of the off-the-top-of-my-head
7 response to this. You could engage in a scheme to
8 defraud, even one that involved sort of unwitting
9 intermediaries -- 18 United States Code, Section 2(b),
10 causation, um, but it doesn't have to be aiding and
11 abetting. But --

12 (Interruption, dial tone.)

13 (Places call again.)

14 THE COURT: We're going to go ahead without
15 Mr. Harris. He's been disconnected. My time is
16 limited.

17 If all the requirements of a scheme to defraud --
18 um, it's the scheme that's the crime. So if you look at
19 a case like **Potter**, which we discussed a lot in **DiMasi**,
20 a First Circuit case, um, there were people who wanted
21 to get money to a public official in Rhode Island
22 through his law firm, the public official didn't know
23 anything about it, and the money never got there. But
24 the people who devised the scheme were held liable. And
25 it appears in **Potter** that even the lawyer who was being

1 retained didn't share the criminal intent. He wasn't
2 charged.

3 MR. McGINTY: And presumably the scheme
4 contemplates a benefit shared by the parties involved in
5 the scheme and here it's the sale of an item where the
6 seller is indifferent to whether the user uses it at
7 all.

8 THE COURT: All right. All right. Here's
9 what I'm going to do. You're going to -- I'm ordering
10 that you simultaneously supplement your briefs by
11 November 4th and replies can be filed by November 14th,
12 or further submissions, and I'll give you a hearing on
13 December 8th at 3:00. And because of the pendency of
14 the motion, the speedy trial clock remains stopped, that
15 further briefing and a hearing is certainly required.
16 All right?

17 And I'm going to ask, or if necessary order you to
18 order the transcript of this hearing. I'm going to need
19 to refresh myself and I'm not sure who will assist me on
20 this, so it will be available.

21 MR. McGINTY: The government will order it.

22 (Laughter.)

23 MR. BOOKBINDER: We will, your Honor. We
24 would also ask whether the Court would consider, at this
25 point, setting a trial date. I don't know if we're

1 jumping the gun. But obviously there will be no trial
2 if the Court dismisses the case.

3 THE COURT: All right, I'll give you a trial
4 date, a tentative trial date. But you need about three
5 weeks, right?

6 How about Monday, February the 6th?

7 MR. BOOKBINDER: That's actually, your Honor,
8 a perfect date from our perspective and I think the
9 defense's as well.

10 MR. McGINTY: Yes.

11 THE COURT: If the case isn't dismissed -- as
12 usual I'll aim to decide this orally in December and if
13 I'm able to do that, you know, I'll issue the trial
14 order and the date will be February 6th, unless
15 something comes on my radar screen that disrupts that.
16 Okay?

17 MR. McGINTY: Thank you.

18 MR. BOOKBINDER: Thank you, your Honor.

19 THE COURT: All right. The Court is in
20 recess.

21 (Ends, 12:30 p.m.)
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1 C E R T I F I C A T E
2
34 I, RICHARD H. ROMANOW, OFFICIAL COURT REPORTER, do
5 hereby certify that the forgoing transcript of the
6 record is a true and accurate transcription of my
7 stenographic notes, before Chief Judge Mark L. Wolf, on
8 Thursday, October 20, 2011, to the best of my skill and
9 ability.10
11 /s/ Richard H. Romanow 10-28-11
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13 RICHARD H. ROMANOW Date
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